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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 840

ADAM WALTER STRAUB, A/K/A BILLIE LEE,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. MILTON RUBIN, and
BERNARD BERMAN,
420 Lincoln Road, Suite 392,
Miami Beach, Florida, 33139
Attorneys for Petitioner

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ADAM WALTER STRAUB, A/K/A BILLIE LEE,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Adam Walter Straub, Petitioner herein, by and through his undersigned attorneys and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of October, 1965, and the Order of the same Court denying rehearing entered on the 22nd day of November, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to counsel as to the order denying rehearing is found in Appendix B. hereof.

Jurisdiction of this Court is invoked pursuant to the

JURISDICTION

provisions of Rule 37 (b)(1)(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 11th day of October, 1965 (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.), and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.).

QUESTION PRESENTED

Whether or not the Trial Court erred in giving an instruction as to the presumption of guilt arising under Title 26, U. S. C. Section 4744 (a) where there was no competent evidence of Proof of Demand upon the Defendant to produce the order form required by said section and proof of the failure of the Defendant to so produce.

STATUTES AND RULES INVOLVED

Title 26 United States Code, Section 4744 (a), text of same is set forth in Appendix F hereof.

STATEMENT OF THE CASE

Your Petitioner, Adam Walter Straub, a/k/a Billie Lee, was charged by an indictment returned by the Grand Jury with violating Title 26 U. S. Code, Section 4742 A, and 4744 A, and Title 21, U. S. Code Section 176 A, all relating to the sale of marijuana in violation of the statutes. Certain pretrial motions were filed, none of which require discussion here.

After a two day trial which commenced on March 17, 1964 in Miami, Dade County, Florida, before the Honorable David W. Dyer, United States District Judge, your

petitioner was found guilty and sentenced to five (5) years in custody of the United States Marshal.

In a normal manner the cause came on for argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A.) was entered on the 11th day of October, 1965, and thereafter a Petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by your Petitioner should be granted for the reasons that the decisions rendered in cases of **United States versus Turner**, 132 F. Supp. 336, (United States District Court N. D. Illinois) 1955, and **Charles versus United States**, 215 Fed. 2nd 825, 9th Circuit 1954, are in direct conflict with the Order of the Fifth Circuit in the case at bar in denying petitioner's petition for rehearing without opinion (Appendix C.).

It was pointed out to the Fifth Circuit Court of Appeals that there was no competent evidence of a reasonable demand made upon the Defendant to produce the order form required. A document was introduced as government's exhibit 5 TR 114, 115, 116 (Appendix G.). Examination of this document reveals that it fails to state for what alleged transaction the order form was demanded. It further revealed that the document was not served upon the Defendant. The document does not reflect that receipt of the same was acknowledged by the

Defendant or his duly authorized agent specifically authorized to accept the demand on behalf of the defendant.

It is the contention of your Petitioner that where there was no proof of a reasonable demand upon the Defendant to produce the order form required by law, and no proof that the Defendant failed to produce this form, that the instruction of the Court to the Jury as to presumption of the guilt of the Defendant that failure to produce such form after reasonable demand given to Defendant was improper and reversible error.

Although proof of the demand and its failure to be produced by the Defendant is not an essential ingredient of the government's case, yet when the government chooses to travel on the presumption granted it by the Statute, it must first prove the reasonable demand to produce.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying petition for rehearing without opinion and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

G. MILTON RUBIN and
BERNARD BERMAN,
420 Lincoln Road, Suite 392,
Miami Beach, Florida 33139
Attorneys for Petitioner

BY _____
BERNARD BERMAN

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this _____ day of _____, 1965, mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D. C.

_____

BERNARD BERMAN

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 21517

ADAM WALTER STRAUB, A/K/A BILLIE LEE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the SOUTHERN DISTRICT OF FLORIDA.

(October 11, 1965.)

Before TUTTLE, Chief Judge, THORNBERRY, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM: Appellant attacks his conviction and sentence in the United States District Court for the Southern District of Florida on all counts of a nine count indictment charging him with violations of 26 U. S. C. A. 4744 (a) and 4742 (a) and 21 U. S. C. A. 176 (a), dealing with illegal transfer and sale of marijuana.

We find no merit in appellant's contention that the trial court erred in permitting testimony as to the con-

tents of an envelope in which the marijuana particles had been placed when the marijuana itself was not introduced in evidence, Francis v United States, 239 F.2d 560, 10 Cir.

We conclude that proper service was made of the demand required under 26 U. S. C. A. 4744 (a) to justify the trial court's charging the jury on the presumption set out in that section of the statute.

Finally, there was ample evidence to warrant submission of the charge under count IV to the jury. The facts of the transfer there alleged, in conjunction with the constructive possession by appellant, are sufficient to sustain the conviction in spite of the fact that appellant was not physically present. See **Grant v United States**, 9 Cir., 291 F.2nd 746, cert. denied 368 U. S. 999.

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth, Clerk
Room 408-400 Royal St.
New Orleans, La. 70130

November 22, 1965

Re: No. 21517

Adam Walter Straub A/K/A Billie Lee,

-vs-

United States of America

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk.

Mr. G. Milton Rubin,
Attorney-at-Law,
Miami Beach, Florida 33139

Mr. Edward F. Kaufman
Assistant U. S. Attorney
Miami, Florida

APPENDIX B 2.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO: 21,517

ADAM WALTER STRAUB, A/K/A BILLIE LEE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(November 22, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, THORNBERRY, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM:

It is ORDERED that the Petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX C.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 21517

ADAM WALTER STRAUB,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Middle District of Florida

---

PETITION FOR REHEARING

ULRICH, RUBIN & BERMAN,
G. MILTON RUBIN, Esq.,
Attorney for Appellant

PETITION FOR REHEARING

THE APPELLANT, Adam Walter Straub, A/K/A Billie Lee, by and through his undersigned attorney, respectfully petitions this Honorable Court for Rehearing, and in support thereof would state:

1. THAT the Court has applied the theory stated in **Francis vs United States** 239 Fd 560 (C.A. 10, 1956) on the premise that the testimony of the witness was as stated in Appellee's Reply Brief. However, the transcript of testimony does not reveal such testimony.

2. IT is respectfully submitted that the transcript of testimony is completely silent in reference to the question of proper service of the demand required under Title 26 U. S. C. A. 4744 (a) and that this Honorable Court has erroneously construed an attempted service upon an unauthorized person as service upon the Appellant.

WHEREUPON Appellant respectfully Petitions for Rehearing.

ULRICH, RUBIN & BERMAN, by
G. MILTON RUBIN, ESQ.,
Attorney for Appellant

G. MILTON RUBIN,
420 Lincoln Road, Suite 392,
Miami Beach, Florida 33139

COUNTY OF DADE,)
) SS:
STATE OF FLORIDA)

BEFORE ME this day personally appeared G. MILTON RUBIN, Attorney for Appellant, who after being duly sworn made oath that the foregoing Petition for Rehearing has been presented in good faith and not for purpose of delay.

G. MILTON RUBIN
Attorney for Appellant

SWORN TO AND SUBSCRIBED before me this _____ day of November, 1965.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My commission expires: June 30, 1968
(SEAL)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day mailed a true and correct copy of the foregoing Petition for Rehearing to William A. Meadows, Esq., United States Attorney, P. O. Box 1070, Miami, Florida 33101.

G. MILTON RUBIN
Attorney for Appellant

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO: 21517

ADAM WALTER STRAUB,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeal From The United States District Court for the Southern District of Florida

---

ULRICH, RUBIN & BERMAN, by
G. MILTON RUBIN, and
BERNARD BERMAN,
Attorneys for
ADAM WALTER STRAUB,
Appellant

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 21,517

ADAM WALTER STRAUB,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee

BRIEF IN BEHALF OF ADAM WALTER STRAUB, APPELLANT

Appeal from the United States District Court for the Southern District of Florida

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STATEMENT OF THE CASE

The Appellant, ADAM WALTER STRAUB, also known as BILLIE LEE, was the Defendant below. On October 1, 1963 the Grand Jury returned an indictment containing nine counts. The Appellant will hereinafter be referred to as the Defendant and the United States of America will be hereinafter referred to as the government.

The Defendant, ADAM WALTER STRAUB, was charged in the United States District Court, Southern District of Florida, in violation of Title 26, U. S. Code Sections 4742 A and 4744 A, and Title 21, U. S. Code Section 176 A, all relating to the sale of marijuana in violation of the Statutes.

The allegations of the indictment were founded on the following facts:

On or about February 4, 1963 the Defendant, ADAM WALTER STRAUB, was alleged to have sold marijuana to one Stephen J. Evans. Evans allegedly took possession of the marijuana, having received it in a sealed envelope and kept the substance that he received for approximately twenty-four hours. Evans had opened the package that he received and after opening it he placed the package in some bushes outside an apartment house where it remained for the greater part of a day. During this time it was out of the care and control of Evans and he had no knowledge of what had happened to the package or whether anyone tampered with it. This package was subsequently delivered to Richard J. Dunagan, a narcotics agent. The package and its contents were never introduced into evidence. On or about February 10, 1963, the said Stephen J. Evans allegedly purchased marijuana from another person who was in the apartment occupied by the Defendant. This person was never fully identified, was never called as a witness although it was determined that he was sharing the apartment with the Defendant. Finally, it was alleged in the indictment found against the Defendant that on or about February 11, 1963 the Defendant transferred marijuana to narcotics agent Richard J. Dunagan, Subsequent to this last transfer a notice of

demand for the transfer form required under the Statute was presented to G. Milton Rubin, who was the attorney for the Defendant. No demand was ever made upon the Defendant for the production of these forms.

An indictment by the Federal Grand Jury was returned on October 1, 1963, charging the Defendant with violation of the U. S. Code pertaining to the transfer of marijuana and charging the Defendant with nine counts covering the three alleged transactions. Defendant moved for a bill of particulars which was denied, except for those requests demanding knowledge as to whether the Defendant personally made the transfer charged in the indictment. The United States returned to the bill of particulars on these matters alleged that the Defendant personally made the alleged transfer on the dates of February 4, 1963 and February 11, 1963, but that the alleged transfer of February 10, 1963 was made by a person other than the Defendant and not in the presence of the Defendant.

This matter came on for trial before the Honorable David W. Dyer, Judge, District of the United States in and for the Southern District of Florida, Miami Division, on March 17, 1964. Trial was had before a jury. At the conclusion of the trial, the matter was submitted to a jury who returned a verdict of guilty as to all nine counts of the indictment. Sentence was imposed on each of the counts of the indictment of imprisonment for a term of five years and a fine of One Thousand Dollars ($1,000.00) the said imprisonment to run concurrently. The instant Appeal is taken from the said verdict and sentence.

QUESTIONS INVOLVED

QUESTION I

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 1, 2, and 3 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

QUESTION II

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 4, 5 and 6 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

QUESTION III

WAS THERE ERROR IN THE COURT'S GIVING AN INSTRUCTION AS TO THE PRESUMPTION OF GUILT ARISING UNDER TITLE 26, UNITED STATES CODE SECTION 4744 (a) WHERE THERE WAS NO COMPETENT EVIDENCE OF PROOF OF DEMAND UPON THE DEFENDANT TO PRODUCE THE ORDER FORM REQUIRED BY SAID SECTION AND PROOF OF THE FAILURE OF THE DEFENDANT TO SO PRODUCE?

QUESTION IV

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 7, 8 and 9 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

ARGUMENT

POINT I

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 1, 2, and 3 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

The court erred in failing to direct a verdict in favor of the Defendant as to Counts 1, 2 and 3 of the indictment which pertained to the alleged sale of a substance which was alleged to have been marijuana. The Court further erred in entering an adjudication of guilt upon the verdict of guilty rendered by the jury on these three counts.

In order to sustain the burden of proof on the indictment, first and foremost, the government, as to all three counts, had to prove that the substance which was allegedly transferred from the Defendant was marijuana.

In other words, before the government could even be said to have made a prima facie case, the identity of the substance in question must be established.

There is absolutely no competent testimony that the substance which allegedly was transferred from the Defendant to the witness Evans, was marijuana. The witness Evans merely testified that he got a sealed package from the Defendant, (TR 23). His identification of the substance has no weight inasmuch as he could not, not being an expert, identify the substance as that which is involved in the applicable statutes, to-wit: Title 26, United States Code Sections 4741(a), 4742(a), and 4744(a) and Title 21, United States Code Section 176(a).

The substance which was allegedly transferred was never produced in Court and no expert testimony was elicited as to the nature of the alleged substance.

While it is true that the witness Evans stated that he turned the substance over to an agent of the Narcotics Bureau, Agent Dunagan, upon cross-examination it was learned that the package Evans had received had been left out in the open in the bushes for some twelve (12) hours (TR 29). Evans later retrieved a package from that area which he gave to Agent Dunagan. The witness Evans admitted that he did not know whether the package or the substance that he turned over to Agent Dunagan was the same that he received from the Defendant (TR 32). So that even if there were expert testimony as to the nature of the substance received by Agent Dunagan there is a break in the chain of control which vitiates the evidence.

THEREFORE, there is absolutely no testimony to show that the substance which was allegedly transferred from the Defendant to the witness Evans was marijuana as the same is defined by the applicable United States Statutes. Nor is there testimony that the Defendant possessed any marijuana.

POINT II

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 4, 5 and 6 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

The Court erred in failing to direct a verdict in favor of the Defendant as to Counts 4, 5 and 6 of the indictment as to the alleged transfer of a substance allegedly to have been marijuana from the Defendant to the witness Evans on or about February 10, 1963, and the Court further erred in adjudicating the Defendant guilty where there was no evidence of guilt.

In this instance as in the alleged transaction of February 4, 1963, there is no testimony as to the nature of the substance transferred. Neither the witness Evans nor the Narcotics Officer ever testified and indeed they could not so testify not being experts as to the nature of the substance transferred. The substance itself was never introduced into evidence, and therefore the expert

chemist Allen Hill never identified this substance as being marijuana. Here, again, the government failed to prove the basic element of the crimes, to-wit: that the substance marijuana as it is defined by the statute was ever involved in the alleged transaction, or that the Defendant possessed marijuana at the time specified.

In addition, it is of prime importance to note that at the time of the alleged sale on February 10, 1963, the Defendant, according to the testimony of the witness Evans, was not even present and did not participate in the alleged transfer of the substance which is alleged to have been marijuana (TR 44-45). The testimony of Evans was that he called the Defendant and asked to buy a record and not marijuana. (TR 36, 44). There is no testimony that the Defendant ever told anyone to sell Evans any marijuana. There is testimony to show that the Defendant sold records.

Where the government, as here rest on circumstantial evidence, such evidence must be completely inconsistent with innocence.

RODRIQUEZ v. UNITED STATES, 232 Fed. 819

Such is not the case here. The government in this instance was obviously going on the theory that the Defendant aided and abetted in the transfer of marijuana and, therefore, was a principal. However, the government never produced the person whom it is alleged made the actual transfer even though with the vast resources available at the government's command, they certainly must have known his name and his whereabouts. Certainly his testimony would have been of prime importance in an

attempt to show that the Defendant was a principal under Title 18, United States Code Section 2. There is absolutely no competent testimony to show that the Defendant was guilty of the crimes that he is alleged to have committed on February 10, 1963 as set forth in Counts 4, 5 and 6 of the indictment.

It should be noted further at this point that the government never charged the Defendant with being a principal by aiding and abetting in the commission of the crime or by engaging in a conspiracy to commit the crimes charged.

Therefore, the Court erred in failing to direct a verdict in Defendant's favor and in adjudicating the Defendant guilty upon the verdict of the jury.

POINT III

WAS THERE ERROR IN THE COURT'S GIVING AN INSTRUCTION AS TO THE PRESUMPTION OF GUILT ARISING UNDER TITLE 26, UNITED STATES CODE SECTION 4744 (a) WHERE THERE WAS NO COMPETENT EVIDENCE OF PROOF OF DEMAND UPON THE DEFENDANT TO PRODUCE THE ORDER FORM REQUIRED BY SAID SECTION AND PROOF OF THE FAILURE OF THE DEFENDANT TO SO PRODUCE?

The court erred in instructing the jury as to the presumption of guilt arising under Title 26 United States Code Section 4744(a), where there was no proof of a reasonable demand upon the Defendant to produce the order form required by law and no proof that the Defendant failed to produce this form. Counts 1, 4 and 7

charged the Defendant with transferring a quantity of marijuana not in pursuance to a written order of the person to whom the said marijuana was transferred on forms issued in blank for that purpose by the Secretary of the Treasury or his delegate. Counts 2, 5 and 8 charged the Defendant with being a transferee required to pay the transfer tax imposed by Title 26, United States Code Section 4741(a). The statute provides that proof that any person shall have or have had in his possession any marijuana and shall have filed after reasonable notice and demand by the Secretary of the Treasury or his delegate to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence in guilt. In other words, there is a presumption that the Defendant is guilty if it is shown that after reasonable demand to produce the order form required the Defendant failed to do so.

While proof of the demand of the order form and its failure to be produced by the Defendant is not an essential ingredient of the government's case, yet when the government chooses to travel on the presumption granted it by the statute it must first prove the reasonable demand the refusal to produce.

UNITED STATES v TURNER, 132 F. Supp. 336

In this case the government failed to show a reasonable demand made upon the Defendant to produce the order form required.

A document was introduced into evidence as Government's Exhibit 5, (TR 116). An examination of the document shows that it does not state for what alleged transactions the order form is demanded. It does not show that it was ever delivered to the Defendant and the

testimony in the record affirmatively shows that no demand was made on the Defendant personally or upon his authorized agent as such authorized agent is defined by 26 C.F.R. 152.47 (TR 114). The Federal regulation relating to marijuana provides that the order forms required to be had by persons dealing in narcotics may be obtained only by the person registered to deal in narcotics or by his agent who has authority by virtue of a Power of Attorney filed with the Secretary of the Treasury upon a form prescribed by him. In view of this, reasonable demand can only be considered to be a demand upon that person who is authorized to obtain the order form, to-wit: the person dealing in narcotics or his agent who has complied with the requirements of the filing of the Power of Attorney as prescribed by the Secretary of the Treasury. An attempted service of a notice of demand to produce upon the Defendant unless it is first shown that such person has the specific authority to accept the demand on behalf of the Defendant.

Therefore, the government, in failing to prove the reasonable demand required by statute and the failure of the Defendant to comply with such demand, cannot avail itself of the presumption of the statute.

UNITED STATES v. TURNER, Supra

CHARLES v. UNITED STATES, 215 Fed. 2d 825

Since the Defendant must be presumed innocent as to all elements of the crime,

MORISSETTE v. UNITED STATES, 342 U. S. 246.
72 D Ct. 240,
96 L. Ed. 288

The only presumption which the court may indulge in is that the Defendant actually had the forms required by law if there had been any transfer of marijuana. The government totally failed to prove that the Defendant did not have the forms required and state further as to Counts 2, 5 and 8 failed to prove that the Defendant was a transferee required to pay a transfer tax and acquired marijuana without having paid such tax. Therefore, there was no proof of the crime as to these matters.

The Court in view of the above erred in instructing the jury as to the presumption involved. (TR 179-180). While the Defendant is not unmindful of the provisions of Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 30, still this Court under Federal Rules of Criminal Procedure, Rule 52(b) may take cognizance on its own of errors which are so fundamental as to deprive the Defendant of a fair trial such is the case before this Court.

GLENN v. UNITED STATES: 271 Fed. 2d 880 and cases cited therein

The Defendant could in no way receive a fair trial as to those matters and those counts concerning the possession and transfer of marijuana contrary to law without having an order form as prescribed by the statutes where there was no proof of the essential elements of the crime, but the guilt was founded upon a presumption which did not properly arise under the law. It was fundamental error for the Court to inform the jury that the Defendant would be presumed guilty under circumstances where no presumption should arise. It may even be inferred that this error so influenced the jury that the Defendant

was found guilty on all counts merely based on the fact that the jury relying on the instruction of the Judge gave credence to the presumption and in finding the Defendant guilty of those counts felt that the Defendant if he was guilty of one was guilty of all the crimes charged against him.

POINT IV

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 7, 8 and 9 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

The Court erred in failing to direct a verdict in favor of the Defendant and entering an adjudication of guilt upon the jury verdict in regards to Counts 7, 8 and 9 of the indictment relating to the alleged transactions of February 11, 1963.

As seen above, the Court erred in entering its adjudication of guilt on those counts relating to the possession or transfer of marijuana where the guilt of the Defendant was established by the reliance of the government upon a presumption which should never have been permitted to be presented to the jury and which the Court should not have considered in any way.

The government wholly failed to prove each and every allegation of the charges contained in Counts 7, 8 and 9 of the indictment beyond and to the exclusion of

every reasonable doubt as they must have done in order to justify a conviction of the Defendant.

In addition, even if for argument's sake, we may consider that the evidence produced by the government was sufficient to present a jury question as to the Defendant's guilt, the Defendant was irreparably harmed by the fact that the jury was allowed to consider those counts of the indictment upon which there was no competent evidence to sustain a verdict of guilt and no competent evidence to raise a jury question as to the Defendant's guilt. The Defendant was irreparably harmed by the Court instructing the jury as to a presumption of guilt as to certain counts when this presumption of guilt did not in fact exist. This harm obviously manifested itself in the fact that the jury faced with this array of charges and this erroneous presumption may have felt that where there is smoke there is fire and therefore, since the Defendant was charged with so many misdeeds, he must therefore be guilty.

CONCLUSION

It is respectfully submitted:

1. That the case should be reversed and remanded with directions to enter a judgment of acquittal.

2. That the case should be reversed and remanded for a new trial.

G. MILTON RUBIN,
BERNARD BERMAN and
EPHRAIM COLLINS

BY: _____
G. MILTON RUBIN,
Attorneys for Appellant,
1440 79th Street Causeway,
Miami Beach, Florida 33141

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day mailed a true and correct copy of the foregoing Brief to WILLIAM A. MEADOWS, ESQ., United States Attorney, Federal Building, Miami, 32, Florida this _____ day of November, 1964.

_____
G. MILTON RUBIN

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO: 21517

ADAM WALTER STRAUB,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the Southern District of Florida

---

ULRICH, RUBIN & BERMAN, by
G. MILTON RUBIN, ESQ.,
Attorney for
ADAM WALTER STRAUB,
Appellant

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO: 21,517

ADAM WALTER STRAUB,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee

REPLY BRIEF IN BEHALF OF ADAM WALTER STRAUB, APPELLANT

Appeal from the United States District Court for the Southern District of Florida

---

PRELIMINARY STATEMENT

This brief is presented to the Court as a reply to the Brief of the Appellee.

ARGUMENT

POINT I

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 1, 2 AND 3 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

The Appellee has gone outside the record in referring to the testimony of the chemist, Allan Hill, as stated in the opening paragraph under this point in Appellee's Brief, which is set forth as follows:

> "that the substance that he had received from Dunagan on February 7, and 11, 1963, which was the only items he had received during the time, was mariguana, ... "

This statement is erroneous and/or inadequate in that the appellee has not referred to the pages of the record on Appeal to substantiate such statement and the record does not reflect that such statement was made by the witness.

Although Appellee has referred to the record in other matters set forth in its Brief, once again reference is made to Mr. Hill analyzing the substance contained in the envelope he received from Dunagan on February 7, 1963 on the allegation that he found it to be mariguana.

Once again, with reference to this statement in the Brief no reference has been made to the record and such reference is not supported by the record.

The Appellee states that there was no break in the chain of control and that testimony provided competent and sufficient evidence for consideration by the jury, all with the reference to the February 7, 1963 item. However, upon cross-examination of the witness Evans, testimony showed that it was out of possession of the said witness for over twelve (12) hours (TR 29), surely indicating sufficient evidence of a break in the chain of control.

The Appellee with reference to delivery of a substance to Mr. Hill on February 11, 1963 sets forth that Mr. Hill's analysis with reference to that substance was marijuana, and that the substance first given to the witness Evans in the apartment by one other than the Defendant, was the same substance later analyzed by Mr. Hill. These allegations in the Appellee's Brief are not supported by reference to the record and there is nothing in the record to support such statements.

In rebuttal therefore it is respectfully submitted that these arguments as set forth by the Appellee in regard to this point are without merit.

POINT II

DID THE COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND IN ENTERING AN ADJUDICATION OF GUILTY UPON THE JURY VERDICT AS TO COUNTS 4, 5 AND 6 WHERE THERE WAS NO COMPETENT EVIDENCE AS TO THE DEFENDANT'S GUILT?

The Appellee in its next to last paragraph under this point has referred to Section 4744(a) which calls for reasonable notice and demand and has alleged in this point in its Brief that there are facts showing that such reasonable notice and demand was made upon the Defendant by making such notice and demand upon the attorney for the Defendant. No reference is made to the record in support of such statement in the Brief, nor is there anything to show that the alleged notice and demand upon the attorney is reasonable as to proof of notice and demand upon the Defendant so as to allow the Court to properly instruct the jury in the presumption of guilt.

It is obvious that no objection was raised to the Court's failure to instruct on this subject, since there was no competent evidence and the record is silent on this subject of reasonable notice and demand, nor do the exhibits introduced in to evidence substantiate the statement that the original notice and demand was admitted into evidence at the trial on March 17, 1964 (TR 117), as is alleged in the Appellee's Brief. Such exhibit will reflect that it is merely a copy of a notice as prepared by the agents investigating the case and nothing more.

Since Appellee has not supported the foregoing statements in its Brief, it is submitted that this argument that the notice and demand was reasonable under the circumstances is without merit.

CONCLUSION

Appellee has presented to this Court a Brief much of which consists of matters dehors the record.

Therefore, it is urged that this tribunal correct the errors of the Court below and enter an order of reversal. In the alternative it is urged that this Tribunal enter an order of reversal on Counts 1, 2, 3, 4, 5, and 6, which counts should have been withheld from consideration by the jury, by granting of a motion for a directed verdict of acquittal and remand Counts 7, 8 and 9 for a new Trial.

RESPECTFULLY SUBMITTED.

ULRICH, RUBIN & BERMAN, by
G. MILTON RUBIN, ESQ.,
Attorney for Appellant

G. MILTON RUBIN,
1440 79th Street Causeway,
Miami Beach, Florida 33141

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day mailed a true and correct copy of the Foregoing Reply Brief of Appellant to WILLIAM A. MEADOWS, ESQ., United States Attorney, P. O. Box 1070, Miami, Florida, 33101, this 4th day of February, 1965.

G. MILTON RUBIN,
Attorney for Appellant,
1440 79th St. Causeway,
Miami Beach, Florida 33141

APPENDIX F

TITLE 26, U. S. C. Section 4744(a)

4744(a) — Unlawful Possession

(A) Persons in general: It shall be unlawful for any person who is a transferee required to pay the transfer tax impassed by section 4741(a) to acquire or otherwise obtain any marijuana without having paid such tax; and proof that any person shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by Section 4741(a).

APPENDIX G

"COPY OF TRANSCRIPT PAGES: 113, 114, 115, 116

Page 113

JACK L. GREENE,

was called as a witness on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

THE CLERK:

Please state your full name and occupation.

THE WITNESS:

Jack L. Greene, Narcotic Agent, Federal Bureau of Narcotics.

DIRECT EXAMINATION

BY MR. KAUFMAN:

Q How long have you been so employed, Mr. Greene?
A Excuse me?

Q How long have you been employed as a narcotic agent?
A Three years.

Q Were you so employed in May, 1963?
A Yes, I was.

Q Do you know Mr. Rubin, the defendant's attorney?
(127) A Yes, I do.

Q Do you recall seeing him on May of 1963?
A Yes, I do.

Q What date was that?
A That was the 3rd of May.

Q Where was that?
A At the office of the Bureau of Narcotics.

Q At that time, what did you do, if anything.
A I served a Notice of Demand on Mr. Rubin as attorney for Mr. Straub, requesting that his client . . .

MR. BERMAN:

Your Honor, I am going to object to anything that the Notice of Demand might contain. That would speak for itself.

THE COURT:

Do you have it?

MR. KAUFMAN:

We have a copy of it.

BY MR. KAUFMAN:

Q This demand you speak of, do you have a copy thereof?
A Yes, I left it out in my file.

MR. KAUFMAN:

Could we excuse this witness for one moment?

THE COURT:

Yes. (Short recess following which the witness resumed the stand)

MR. KAUFMAN:

May I mark this first for (128) identification?

THE CLERK:

Government's Exhibit 4 for Identification. (The copy of Notice of Demand was marked Government's Exhibit 4 for Identification)

BY MR. KAUFMAN:

Q I show you Government's Exhibit No. 4 and ask you to identify it, please.

A This is a copy of the Notice of Demand I served on Attorney Milton Rubin.

Q On that particular date?

A Yes.

Q The date that you testified to?

A Yes, it was.

Q By whom?

A By Milton Rubin, attorney and agent for Adam Straub, alias Billie Lee.

MR. KAUFMAN:

Your Honor, counsel has given me the original thereof. I would like to identify this and introduce it into evidence.

MR. BERMAN:

Your Honor, we will stipulate that this is the original and would be the best evidence.

(129) THE COURT:

All right, let it be marked. Do you withdraw your exhibit for identification?

MR. KAUFMAN:

Yes, I do.

THE CLERK:

Government's Exhibit No. 5.

(The notice of Demand was marked Government's Exhibit No. 5 for Identification.)

BY MR. KAUFMAN:

Q Once again, Agent Greene, identify this if you can, Exhibit No. 5.

A I don't have my signature on this, but we made out six copies and gave him one and kept five.

Q Can you identify this.

THE COURT:

It is already stipulated, counsel, that this was served upon him.

MR. KAUFMAN:

I offer this in evidence, your Honor.

MR. BERMAN:

We have no objection.

THE COURT:

It will be admitted.

THE CLERK:

Government's Exhibit 5 in evidence. (The notice of Demand marked Government's Exhibit No. 5 was received in evidence.)

BY MR. KAUFMAN:

Q Subsequent to your delivery of this demand, was any order form surrendered to the Federal Bureau of Narcotics in this building

(130) A No, there wasn't.

MR. KAUFMAN:

Your Witness.

CROSS EXAMINATION

BY MR. BERMAN:

Q Do you know of your own knowledge, Mr. Greene, whether or not any order form was delivered in this building?
A Yes, I do.

Q Do you know it by speaking with other people?
A Yes.

Q You only know what they told you?
A Yes.

Q You don't really know of your own personal knowledge. You just know that they told you?
A I don't understand what you are driving at.

Q You said no order form was delivered in this building; is that right?
A Well, when he said this building, I assumed he meant the narcotics office in the building.

Q I will ask you the question: Was any order form delivered in this building?
A I don't know.

MR. BERMAN:

No further questions.

THE COURT:

Anything further?

MR. KAUFMAN:

I have no further questions of (131) this witness.

THE COURT:

Let me ask you this question, Mr. Greene. Do you know of your own knowledge whether any copy of official order form required by Section 4742 of the Internal Revenue Code of 1954 was delivered to Room 346 of the United States Post Office Building?

THE WITNESS:

There was none delivered, your Honor.

THE COURT:

Do you know that of your own knowledge?

THE WITNESS:

Yes, I do sir.

THE COURT: All right, you are excused. (Witness excused)

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October term, 1965

NO: 21517

D. C. Docket No. 63-518-CR-DD
ADAM WALTER STRAUB, a/k/a BILLIE LEE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before Tuttle, Chief Judge, Thornberry, Circuit Judge, and Carswell, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under

submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: October 11, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 840

ADAM WALTER STRAUB, A/K/A BILLIE LEE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of nine counts charging illegal acquisition, transfer and sale of marihuana, in violation of 26 U.S.C. 4742(a), 4744(a), and 21 U.S.C. 176a. He was sentenced to five years' imprisonment on each of six counts and two years' imprisonment on each of the remaining counts, the sentences to run concurrently. In addition, petitioner was fined $1,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A; 351 F. 2d 304).

799-215—66

The government's evidence, the sufficiency of which is not challenged here, showed that petitioner made three sales of marihuana in February 1963 (see R. 3–5, 9–10, 13, 23, 49, 71–74, 92, 104, 119–123). In addition, a government agent testified that he served a notice on petitioner's counsel on May 3, 1963, demanding production within eight days of official order forms required to be retained by transferors and purchasers of narcotics under 26 U.S.C. 4742 (G. Ex. 5) and that no such forms were presented to the Bureau of Narcotics (R. 113–119). In its charge to the jury, the trial court stated—in accordance with 26 U.S.C. 4744 (a)[1]—that if the prosecution had established receipt of the notice of demand by the petitioner and a failure to comply, the jury could infer, although it need not do so, that petitioner acquired the marihuana without having paid the prescribed tax (R. 179). Although no objection was made to this charge, petitioner now claims that the instruction constituted reversible error.

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[1] It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by 4741(a).

The failure to furnish an order form upon demand is not an element of the offense of acquiring marihuana without paying the transfer tax. However, when the demand and failure are shown, the statutory presumption arises that petitioner's possession is unlawful. *Gondron* v. *United States,* 256 F. 2d 205 (C.A. 5), certiorari denied, 358 U.S. 865; *Williams* v. *United States,* 260 F. 2d 125, 130–131 (C.A. 8), certiorari denied, 359 U.S. 918. In the present case, the demand was served upon an attorney who represented petitioner at the time of service and throughout the judicial proceedings and who signed it as agent for petitioner. Neither the federal agent's testimony as to the demand and failure to comply nor the introduction into evidence of the notice of demand itself was objected to at trial (see Pet. App. 31–37), and no claim was made that petitioner was unaware of the demand. In these circumstances, the court was plainly justified in advising the jury of the statutory presumption. See *Manning* v. *United States,* 274 F. 2d 926 (C.A. 5); *Miller* v. *United States,* 273 F. 2d 279 (C.A. 5), certiorari denied, 362 U.S. 928.[2]

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[2] *United States* v. *Turner*, 132 F. Supp. 336 (N.D. Ill.), and *Charles* v. *United States*, 215 F. 2d 825 (C.A. 9), relied on by petitioner (Pet. 3), are inapposite. In neither case did the government show, as it did here, that a demand for the tax order form was made.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966